Supreme Court, U.S.
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No. 09-1509

In The

Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD., et al.,

Petitioners,

v.

MERCEDES BENZ, U.S.A., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT MERCEDES-BENZ, U.S.A.

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COUNTER-STATEMENT OF QUESTION PRESENTED

The Court of Appeals for the Third Circuit affirmed the Judgment of the District Court against Petitioners, finding that the District Court did not abuse its discretion in excluding the testimony of Petitioners' experts and complied with existing law in granting Summary Judgment on Petitioners' claims because of Petitioners failure to prove antitrust injury or, for that matter, any injury at all. Thus, no compelling reason has been shown for this Court to issue a Writ of Certiorari under Rule 10.

PARTIES TO THE PROCEEDING

Mercedes-Benz, USA, *Respondent*; Coast Automotive Group, Ltd. and Tamim Shansab, *Petitioners*; David Michael Motor Cars Corp., Ray Catena Motor Cars Corp., and Contemporary Motor Cars, Inc., *Respondents*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Mercedes-Benz USA, LLC (formerly Mercedes-Benz, USA) makes the following disclosure:

1. Daimler North America Holding Corp. and Daimler AG are parent corporations of Mercedes-Benz USA, LLC.

2. The only publicly held corporation owning 10% or more of Mercedes-Benz USA, LLC's stock is Daimler AG.

3. Daimler AG is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

As set forth in the Petition and attached thereto as Appendix A, B, C & D.

JURISDICTION

As claimed in the Petition.

STATUTES AND OTHER PROVISIONS INVOLVED

As set forth in Petition and Fed. R. Evid. 702.

STATEMENT OF THE CASE

In 1992 Tamim Shansab ("Shansab") purchased Coast Automotive Group, Ltd. ("Coast"), a failed automobile dealership in Toms River, New Jersey. In late 1995, Coast lost its floor plan financing that had been provided by Volkswagen Credit Co. The Dealer Sales and Services Agreement (the "Dealer Agreement") between Coast and Mercedes-Benz, USA ("MBUSA") required Coast to have floor plan financing. Coast never again obtained the required floor plan financing. Certification of Raymond Dupell July 22, 1999, paragraphs 8-15. After losing its floor plan financing,

Coast filed a Petition in Bankruptcy under Chapter 11 and asserted claims against Volkswagen Credit Co. Coast came out of Bankruptcy in 1997 by borrowing money and conveying an interest in the dealership to an unrelated entity. Dupell July 22, 1999 Certification at paragraphs 22-23.

In 1998, Petitioners sued Respondent MBUSA and the other Respondents in the Superior Court of New Jersey claiming injury based on discrimination against Shansab by reason of his religion, his national origin, as retaliation for his alleged failure to pay bribes to MBUSA employees, and for his alleged failure to agree to fix prices with the other Respondents.

In 1999, it was disclosed at the trial of Shansab's discrimination claims against Toyota that Shansab had purchased the Coast dealership with money obtained from certain Japanese investors. In his application to become a Mercedes-Benz dealer Shansab had concealed those investors and their interest and had misrepresented the source of funds as his own. Dupell July 22, 1999 Certification at paragraphs 27-30. That misrepresentation was grounds for termination under the Dealer Agreement. On June 10, 1999, MBUSA gave Petitioners notice of termination based mainly on the misrepresentation and also on Petitioners' failure to obtain floor plan financing and the submission of improper financial information. Dupell July 22, 1999 Certification at Exhibit G.

Petitioners continued operation gave rise to MBUSA filing the Complaint in this matter seeking,

inter alia, a preliminary and permanent injunction against the use of Mercedes' marks because MBUSA had properly terminated the Dealer Agreement. The matter was assigned to the Honorable Mary L. Cooper, U.S.D.J., who on September 13, 1999, after finding that MBUSA had established a likelihood of success on the merits of the termination, entered a preliminary injunction enjoining Petitioners from use of the Mercedes-Benz trademark. Certification of Michael S. Waters August 1, 2005 at Exhibit 2. That Judgment was affirmed by the Third Circuit Court of Appeals which issued a mandate based on its opinion of June 5, 2001. Waters August 1, 2005 Certification at Exhibit 3. Thus, the operation of the Coast Mercedes-Benz dealership ended in 1999.

Petitioners filed a Counterclaim, subsequently amended, in which they sought damages for MBUSA's termination of the Coast dealership on a variety of legal theories including breach of the New Jersey Franchise Practices Act, breach of contract, and violation of the antitrust laws. They joined the other Respondents, three Mercedes-Benz dealers in New Jersey, claiming they were part of the antitrust conspiracy. Petitioners claimed that because they refused to participate in a conspiracy to fix prices, they were punished by MBUSA in the allocation of automobiles from 1995 to 1998 and then terminated.

In their amended supplemental Rule 26 Disclosure, Petitioners stated that their damages would be set forth in their expert report. In Petitioners' answers to MBUSA's interrogatories, Shansab certified

individually and on behalf of Coast that as to damages they would rely on their experts and were unaware of the underlying facts so as to provide responsive answers.

Petitioners filed two expert reports: the report of Mr. Markovitz ("Markovitz") which calculated lost profits prior to the termination and the report of Dr. Del Roccili ("Del Roccili") which calculated the value of the dealership at termination and was based on an extension the pre-termination profits asserted by Markovitz.

Proof of improper allocation, the failure of MBUSA to offer Coast cars it allegedly had earned under MBUSA's allocation system, was not contained in either report. The reports were found by the District Court to be inadmissible for a failure to comply with Fed. R. Evid. 702. District Court Opinion September 26, 2006 Appendix C 44a-54a. The Court noted the fact that in every year Petitioners were offered more cars by MBUSA than they purchased. 51a.

The District Court addressed the motions in its opinion of September 26, 2006. The Court granted summary judgment in favor of MBUSA, *inter alia*, on Count Two of the Complaint and denied Coast's motion for summary judgment on Count Two, holding Coast's and Shansab's misrepresentations were valid grounds for termination of the Dealer Agreement.

The summary judgment ruling in the District Court left two counts of the Counterclaim for trial: Count Three under the Dealer Day in Court Act, and

Count Four asserting a violation of the implied covenant of good faith. Those claims also sought damages for improper allocation of cars. After the pretrial, the District Court's *in limine* rulings on damages led to the entry of Final Judgment on October 21, 2008, which was not opposed by Petitioners. District Court Order of October 15, 2008. Petitioners never briefed on appeal the decision upholding termination based on Petitioner's misrepresentation.

REASONS FOR DENYING THE PETITION

I. The District Court Did Not Abuse Its Discretion In Excluding The Testimony Of Petitioners' Experts And The Court Of Appeals Affirming That Ruling Does Not Require Review By Certiorari

A. Mr. Markovitz

Petitioners' damage claim was based upon their assertion that MBUSA did not offer Coast the number of cars it should have been offered under the proper application of MBUSA's allocation system and that, if it had, Coast would have purchased those cars and resold them at a profit.

As Petitioners were unequivocal in their Rule 26 statements and answers to interrogatories that they would rely entirely on their experts for proof of damages, the motion to strike the expert reports became a critical linchpin for the summary judgment that was thereafter granted. 41a.

Based on its review and analysis of Markowitz's reports and testimony, the District Court determined that Markovitz's opinion was "unreliable and inadmissible." 53a. The District Court noted that to be reliable under Fed. R. Evid. 702 and *Daubert v. Merrill Dow Pharmaceutical*, 509 U.S. 579, 113 S. Ct. 1404, 8 L. Ed. 777 (1962), the offered testimony must be "based on the methods and procedures of science rather than subjective belief or unsupported speculation" and that the expert must have good grounds for his belief. The Court noted it was mandated to exercise the role of gatekeeper insuring that opinion testimony that does not meet the requirements of qualification, reliability and fitness not reach the jury. 43a-44a.

Noting that Markovitz's report contained no analysis and consisted entirely of profit schedules based on factual assumptions, which are neither explained or analyzed in any way (45a, footnote 6), and reviewing the testimony in which Markovitz elaborated on his report, the District Court concluded: "Based on Markovitz's own admissions, he relied on factual assertions and assumptions provided by Shansab without doing any independent analysis and without providing a factual basis for his conclusion that Coast was damaged by unfair allocation. Such speculation should bar the expert's testimony because an 'expert's opinion must be based on methods and

procedures of science rather than on subjective belief or unsupported speculation.'" 49a.[1]

Markovitz merely assumed that the allocation that MBUSA offered Coast in 1995-1998 is not the allocation that Coast was entitled to under Respondent's system.[2] MBUSA denied Petitioners' claim of allocation discrimination. MBUSA's witnesses testified how the allocation was done and that it came to be substantially computer driven. (Certification of Michael S. Waters October 11, 2005 at Exhibit A, Deposition of Peter Collins, and Waters August 1, 2005 Certification at Exhibit 27, Deposition of Joseph Kurp). The result of that process was set forth in a letter to each dealer setting forth the dealers'

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[1] Citing *Paoli II*, 35 F.3d at 742 (citations and internal quotations omitted); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 156 (3d Cir. 2000) ("Although Daubert does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than [a] haphazard, intuitive inquiry.") The Third Circuit has cautioned against the admission of an opinion without sufficient factual predicate, referring to such an opinion as a "castle made of sand." *Elcock v. Kmart Corp.*, 233 F.3d 734, 755 (3d Cir. 2000); *see also Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 99 (3d Cir. 1983).

[2] By contrast in *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788 (7th Cir. 1989) on which Petitioners rely, the decision of the District Court to allow testimony of an expert who evaluated the prior performance of a successful dealership based on more than the plaintiffs opinion was affirmed under the same rule that should apply here.

> The decision to admit expert testimony is committed to the broad discretion of the trial court and its determination will be affirmed unless it is manifestly erroneous. (citations omitted) 872 F.2d 788, 797.

allocations, and each year Coast got a letter advising it of the results of that allocation process and providing MBUSA's estimate of its proper allocation. Waters August 1, 2005 Certification at Exhibit 4. Thus Coast's charge that MBUSA has never argued what the proper allocation should be (Petition at 27) simply ignores the record. The proper allocation is what results from the process described and is communicated in annual letters to all the dealers.

To establish the existence of the damages they sought, Petitioners sought to prove that the allocation they were given by MBUSA was less than the allocation they were properly entitled to under the ordinary application of the allocation system to the performance of the Coast dealership. Petitioners relied on Mr. Markovitz to calculate the number of vehicles MBUSA should have allocated to Coast during the period.

Markovitz opined what a proper allocation to Coast would be in 1995 through 1998, without ever examining MBUSA's allocation system or the allocation records. He merely took an average of all the other dealers in the area, without regard to the fact that they were the subject of vastly disparate performance during the period, and without regard to the failings of Coast during its Chapter 11 and before, and placed Coast in the middle of the group.

Finally, Markovitz studiously ignored the annual letter from MBUSA advising Coast of its allocation. Waters August 1, 2005 Certification at Exhibit 2 Depostion of Markovitz. Had he looked he would have

found that in every year from 1995 to 1998, Coast never once purchased all the cars that MBUSA offered it under the allocation system. During that period, Coast failed to purchase 115 cars that it was offered under MBUSA's allocation to Coast. Certification of Raymond Dupell July 27, 2005 at Exhibit B.

Petitioners now seek to respond in the Petition (Petition p. 23) that because in 1995 Coast sold more cars than it actually bought, (even though it bought less than it was offered) that somehow indicates that the allocation was unfair. But Coast, like any dealer, had cars left over from the prior year which, along with trades or purchases from other dealers, would allow Coast to sell more cars in any year than it actually bought from MBUSA in that year. That does not even address the fact that the allocation of which it complains offered it even more cars, and that Coast declined to purchase them.

The affidavit of Mr. Dupell submitted to the District Court on the motion shows that Coast was allocated 187 cars in 1995 but only purchased 171 leaving 16 cars that it could have had under the allocation offered by MBUSA. In 1996, when it was operating in Chapter 11, it left 68 cars that MBUSA offered and which it did not purchase. In 1997, it failed to purchase 27 cars that MBUSA had allocated to it for purchase, and 3 in 1998. In total, from 1995 through 1998, Coast was allocated 115 cars more than it purchased. Further, Markovitz did not consider the spread of models actually sold to Coast which was roughly similar that offered to other dealers

geographically close to Coast and throughout the New York region as is detailed in the information provided by Mr. Dupell. Dupell July 27, 2005 Certification and Exhibits A and B.

B. Dr. Del Roccili

Dr. Del Roccili's ("Del Roccili") report does not address the issue of damages arising out of alleged allocation discrimination between 1995 and 1998. His report only gives his value for the Mercedes-Benz franchise on the date of termination in 1999, as the capitalization of a perpetual stream of income. He was instructed to assume the allocation discrimination, and his report covers the period forward from the effective date of termination of the dealership. 52a-53a.

When Markovitz's report was stricken, Del Roccili's report was necessarily stricken. The District Court concluded:

> Because the Court has excluded the report of Markovitz based on its failure to conform with the requirements of Fed. R. Evid. 702 of reliability and fit, and because Del Rocilli's report is entirely dependent upon the methods and calculations performed in Markovitz's report, Del Rocilli's report must likewise be stricken.
>
> Here, Markovitz and Del Rocilli's opinions are based on nothing more than speculation and subjective belief in the truth of the assertions made by Shansab about unfair

allocation without any factual basis for those conclusions. They are thus unreliable and inadmissible under Fed. R. Evid. 702. 53a.

II. The District Court's Grant Of Summary Judgment Against Petitioners Because Of Petitioners' Failure To Establish Antitrust Injury Or Any Injury At All, And The Affirming Of That Ruling By The Court Of Appeals Are Well Supported And Do Not Require Review By Certiorari

The District Court's determination striking the expert reports of Markovitz and Del Roccili led directly to granting the motion for Summary Judgment against Petitioner on the Counterclaim because the record established that Petitioners were unable to prove damages. Once MBUSA met its burden, Petitioners "must do more than simply show that there is some metaphysical doubt as to the material facts" in question. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It was incumbent on Petitioners to set forth "specific facts" showing a genuine issue for trial. Petitioners may not rely upon the mere allegations or denials of its pleadings. *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001). Here the facts of record even when construed in a light most favorable to Petitioners, make clear that Petitioners could not meet their burden of submitting admissible evidence of damages.

Petitioners attack the District Court's finding by claiming it is inconsistent with the Court's ruling

in the related class action,[3] and by emphasizing the distinction between proof of the fact of damage and proof of the quantum of damages. It is clear that both proof of the fact of damage and the quantum of damages require some proof of damages that have a nexus to the alleged violation. Petitioners failed to present to the District Court evidence which could be admissible at trial to prove such damages and thus, once the expert reports were removed as unreliable, summary judgment followed. 53a-54a.

Here, the summary judgment motion came after the conclusion of lengthy discovery. It came to the

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[3] The District Court addressed that contention in its opinion on the Motion for Reconsideration:

> Additionally, reconsideration is not warranted in response to Coast's argument that the opinion in this case is inconsistent with that in the class action.
>
> This argument neglects two crucial differences between these two opinions. First, the Court considered Shansab's allegations in different contexts and under different standards. In the class action, the court reviewed Shansab's observations in relation to a motion for summary judgment, whereas in this case, the court assessed whether Shansab's factual allegations were sufficient to support an expert opinion under *Daubert*. Second, the nature of those allegations were different. In the class action, the Court reviewed factual assertions based on Shansab's first-hand knowledge of what was said and done at certain meetings he attended. Here, Coast asks the court to credit assertions by Shansab that incorporate analysis and subjective judgments without providing any expert analysis of the facts supporting Shansab's assertions. District Court Opinion July 25, 2007 Denying Motion for Reconsideration, Appendix B, 15a.

District Court with a full record of the positions of the parties on the issue of damages. Petitioners had very clearly put all their reliance on their experts. In Rule 26 disclosures Petitioners' stated their damages would be established by their experts. In their answers to interrogatories, both Coast and Shansab swore that they did not have knowledge of facts upon which to present damages, but would rely entirely on their experts. No evidence on which a jury could find damages based on this claim of improper allocation was presented to the District Court in opposition to the motion for summary judgment. Petitioners appear to assert that there was sufficient proof of the fact of damages by Mr. Shansab merely having "perceived" that MBUSA had failed to allocate to Coast the cars to which it was entitled.[4]

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[4] By contrast, in *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, on which Petitioners rely, this Court found that while there was uncertainty as to the extent of the damage there was none as to the fact of damage. The Court observed that there was evidence from which it could be found that respondents sold their goods below the cost of production. 282 U.S. 555, 561. No such evidence exists in the record of this matter. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 540 U.S. 451, the issue addressed was Kodak's market power. 540 U.S. 451, 455. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, the issue was whether a sales incentive program violated the price discrimination prohibitions of section 2(a) and the appropriate measure of damages thereunder. 451 U.S. 557, 559. In *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 the issue was not damages but whether Columbia Broadcasting System's cancellation of an affiliation agreement

(Continued on following page)

In the face of evidence as to the computer driven method of the allocation system, the annual presentation to Coast of the cars it was offered under the system, and the availability to Coast and its experts of all the underlying detail on which these calculations were made, Petitioners' failure to show any damage at all was a failure to establish both the fact of damage and the amount of damages.

Moreover, there was nothing presented to the District Court that overcame the irrefutable fact that, however MBUSA calculated Coast's allocation, it offered Coast more cars every year than Coast chose to purchase, thus leading inescapably to the conclusion that MBUSA's conduct did not damage Petitioners.[5]

Contrary to Petitioners' assertion that "the Third Circuit, however, did not fulfill its obligation to provide plenary review and apparently misapprehended this Court's prior precedents in making its analysis." (Petition at 16), the Court of Appeals properly concluded that "Coasts naked contention that Mercedes' allocation method was unfair and resulted in reduced

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was part of a conspiracy to monopolize trade or was the exercise of a contractual right. 368 U.S. 464, 466.

[5] In *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, this court noted Zenith's burden to prove *some* damages flowing from the conspiracy, and that the allegations be shown to be a material cause of the injury 395 U.S. 100, 114, which is "not shown to be attributable to other causes" 395 U.S. 100, 123. Here there was no proof of damage at all, and the "other cause" of Coast's failure to sell more cars was its failure to buy all the cars MBUSA offered to sell it.

profits falls well short of the nexus required by the Clayton Act and relevant case law. . . . Accordingly we hold that the District Court correctly concluded that Coast failed to demonstrate the 'fact of injury.'" Court of Appeals January 25, 2010 Opinion at 6a.

III. The District Court Judgment Finding That Respondent Mercedes-Benz, USA Properly Terminated Petitioners For Misrepresentation, Uncontested By Petitioners On Appeal And The District Court's Final Judgment Against Petitioners, Unopposed By Petitioners, Bar And Render Moot Any Claim By Petitioners For Termination Damages

In Count Two of the Complaint, MBUSA sought a permanent injunction against Petitioners' use of its trademarks. As Petitioners' only basis to use the mark was under Dealer Agreement, that claim required MBUSA to prove that its termination of Coast was lawful. MBUSA relied on Petitioners' misrepresentations regarding the source of funds and other investors. The District Court found that MBUSA had properly terminated Coast.

On appeal Petitioners did not at all address the judgment enforcing termination for misrepresentation. Issues on appeal are limited to those set forth and argued in the party's brief. *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (citing *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991) ("absent extraordinary circumstances, briefs must

contain statements of all issues presented for appeal, together with supporting arguments and citations"), *cert. denied*, 503 U.S. 985 (1992)). "It is well settled that if an appellant fails to comply with these requirements on a particular issue, the appellant has abandoned and waived that issue on appeal and it need not be addressed by the court of appeals." *Id.* (*citing Institute for Scientific Information, Inc. v. Gordon & Breach, Science Publishers, Inc.*, 931 F.2d 1002, 1011 (3d Cir. 1991), *cert. denied*, 502 U.S. 909 (1991)).

The report of Dr. Del Roccili addresses only the value of the franchise at the time of termination. The judgment in favor of MBUSA on its Complaint for termination bars such a claim, as does the unopposed Final Judgment. Petitioners did not address the validity of the termination for misrepresentation on appeal. For those reasons their damage claims are barred.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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